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4   UNITED STATES DISTRICT COURT

5   NORTHERN DISTRICT OF CALIFORNIA

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7   TREASURE ISLAND FORMER AND   Case No. 20-cv-01328-JD
     CURRENT RESIDENTS, et al.,

8   Plaintiffs,

9   v.   **ORDER AND NOTICE TO
                                             PLAINTIFFS RE DISMISSAL**
10   TREASURE ISLAND DEVELOPMENT
     AUTHORITY, et al.,

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               Defendants.

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14   The Court dismissed plaintiffs' prior amended complaint because plaintiffs' allegations

15   were "so vague and perfunctory that they give defendants 'little idea where to begin' in preparing

16   a response." Dkt. No. 49 at 2 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10

17   (2007)). Plaintiffs filed a second amended complaint, Dkt. No. 52, and, with the Court's consent,

18   Dkt. No. 83, a third amended complaint, Dkt. No. 84 (TAC), which is now the operative

19   complaint. Several defendants filed motions to dismiss the TAC. Dkt. Nos. 86, 87, 88. The

20   parties' familiarity with the record is assumed, and the TAC is dismissed.

21   The TAC does not plausibly allege a *Bivens* claim against defendants Keith Forman and

22   David Clark for "violation of bodily integrity" under the Fourteenth Amendment. Dkt. No. 84

23   ¶¶ 96-99. As plaintiffs recognize, this is a novel claim that asks to extend *Bivens* in a new way.

24   Dkt. No. 90 at 4. The request is declined because "expanding the *Bivens* remedy is now a

25   'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). The United States

26   Supreme Court has "'consistently refused to extend *Bivens* to any new context or new category of

27   defendants' . . . for the past 30 years." *Id*. (quoting *Correctional Services Corp. v. Malesko*, 534

28   U.S. 61, 68 (2001)). Plaintiffs have not said why these principles should be disregarded in this

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1   case, or otherwise presented a good reason for the Court to create a new category of *Bivens*

2   liability. *See id.* at 1855-58.

3   So too for the corresponding claim against the City and County of San Francisco under 42

4   U.S.C. § 1983 and *Monell* for bodily integrity under the Fourteenth Amendment. Dkt. No. 84

5   ¶¶ 86-91. Plaintiffs' allegations and arguments on this score are purely conclusory and not

6   supported by facts. *See*, *e.g.*, Dkt. No. 93 at 4 ("When the City of San Francisco is executing an

7   organized, multi-department effort to receive Treasure Island from the Navy and for the last 30

8   years attempting to develop Treasure Island for commercial real-estate development, one can

9   presume that the City of San Francisco was in control of the actions of Amy Brownell and Bob

10   Beck, either directing their actions in the name of furthering the commercial development of

11   Treasure Island -- or at the very least -- ratifying the actions of these subordinates."). Such

12   speculative inferences fall far short of stating a plausible claim. *See In re Gilead Scis. Sec. Litig.*,

13   536 F.3d 1049, 1055 (9th Cir. 2008); *AE v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012).

14   The claim for "false and misleading statements" against Clark and Forman, Dkt. No. 84

15   ¶ 102, is dismissed. Plaintiffs acknowledge that "if Defendants David Clark and Keith Forman

16   were acting within the scope of their employment [with the United States Navy], then the FTCA

17   would provide the Plaintiffs' exclusive remedy and the state court would not have subject matter

18   jurisdiction." Dkt. No. 91 at 2; *see also* Dkt. No. 87 at 6-13 (government's jurisdiction

19   arguments). Plaintiffs also acknowledge that if defendants were acting within the scope of their

20   employment, then plaintiffs' claims would be barred under the FTCA due to plaintiffs' admitted

21   failure to exhaust their administrative remedies. *See* Dkt. No. 91 at 4. The problem for plaintiffs

22   is that it was their burden to rebut the Attorney General's certification that Clark and Forman were

23   acting within the scope of their employment, Dkt. No. 1-2 ¶ 2, which plaintiffs failed to do. *See*

24   *U-Haul Int'l, Inc. v. Estate of Albright*, 626 F.3d 498, 501 (9th Cir. 2010); *see also Pauly v. U.S.*

25   *Dep't of Agriculture*, 348 F.3d 1143, 1150-51 (9th Cir. 2003). This warrants dismissal.

26   Another problem is that the allegations vis-à-vis Clark and Forman remain as

27   impermissibly vague and conclusory as the last go-around that resulted in dismissal. *See* Dkt.

28   No. 49. This again does not satisfy Federal Rules of Civil Procedure 8 and 9(b).

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1   　　　The TAC added claims against several new defendants who were not named in the

2   amended complaint: Amy Brownell, Robert Beck, Anthony Chu, Shaw Environmental Inc., and

3   Tetra Tech EC, Inc. Dkt. No. 84 ¶¶ 75-85, 92-95, 103-138. Although 14 months have passed

4   since the TAC was filed, the ECF docket does not indicate that any of the new defendants have

5   been served. This is so despite the fact that the City and County of San Francisco expressly noted

6   in its motion that City employees Amy Brownell and Robert Beck had not been served, and "the

7   City's counsel left a voice mail message and sent an email to Plaintiffs' counsel requesting an

8   opportunity to discuss service on Ms. Brownell or Mr. Beck." Dkt. No. 88 at 2 n.2.

9   Consequently, pursuant to Federal Rule of Civil Procedure 4(m), defendants Brownell, Beck, Chu,

10   Shaw Environmental, and Tetra Tech EC will be dismissed without prejudice and the case will be

11   closed, unless plaintiffs file by September 12, 2022, a statement demonstrating good cause for the

12   failure to serve.

13   　　　For the claims dismissed in this order, a fifth opportunity for plaintiffs to try and make out

14   a viable claim is not warranted, especially given plaintiffs' failure to serve multiple defendants and

15   the continuing conclusory nature of plaintiffs' allegations. *See Chodos v. West Publishing Co.*,

16   292 F.3d 992, 1003 (9th Cir. 2002). The *Bivens* and fraud claims against Clark and Forman, and

17   the *Monell* claim against the City and County of San Francisco, are consequently dismissed with

18   prejudice.

19   　　　**IT IS SO ORDERED.**

20   Dated: August 30, 2022

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23   　　　　　　　　　　　　　　　　　　JAMES DONATO
　　　　　　　　　　　　　　　　　　　United States District Judge

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